Kunci Semangat Sdn Bhd v Thomas Varkki a/l MV Varkki & Anor

COURT OF APPEAL (PUTRAJAYA) — APPEAL NO W-02(NCvC)(W)-260–02 OF 2021
YAACOB MD SAM, NANTHA BALAN AND NORDIN HASSAN JJCA
14 MARCH 2022

Civil Procedure — Pleadings — Failure to plead illegality — Unregistered estate agents claimed for finder's fee from defendant pursuant to oral contract — Defendant argued that estate agents' claim illegal and in contravention of the Valuers, Appraisers, Estate Agents and Property Managers Act 1981 — Whether illegality must be specifically pleaded — Rules of Court 2012 O 18 r 8

Contract — Illegality — Contravention of law — Unregistered estate agents claimed for finder's fee from defendant pursuant to oral contract — Whether estate agents' claim was prohibited by provisions of the Valuers, Appraisers, Estate Agents and Property Managers Act 1981 — Whether estate agent's claim tainted with illegality — Whether estate agents engaged in estate agency practice — Valuers, Appraisers, Estate Agents and Property Managers Act 1981 ss 22B(1A)(b), (d) & 22C(1)(d)

The plaintiffs were not registered under the Valuers, Appraisers, Estate Agents and Property Managers Act 1981 ('the Act') as estate agents. The plaintiffs' claim for finder's fee from the defendant was predicated on oral contract between the parties whereby the defendant agreed that if the plaintiffs succeeded in locating a suitable property and they were able to negotiate a suitable purchase price, then the defendant would pay the plaintiffs the said fee. The plaintiffs contended that they had located a suitable property and proceeded to negotiate the price for the purchase of the said property on behalf of the defendant, but the defendant had failed to pay the balance of the finder's fee amounting to RM545,720 to the plaintiffs. The defendant filed a counterclaim that the plaintiffs had misrepresented the value and physical characteristics of the land. Further, in the post-trial written submission, the defendant argued that the plaintiffs' claim was tainted with illegality, but the problem was illegality was not pleaded in the defence, was not an issue to be tried and was not at all raised when the evidence was presented during the trial. The High Court had allowed the plaintiffs' claim and dismissed the defendant's counterclaim, hence, the present appeal. The core issue in the present appeal was whether the plaintiffs' claim against the defendant for the balance of the finder's fee was tainted with illegality, ie a claim which was prohibited by the provisions of the Act. The sub-issues to be determined were: (a) whether

illegality must be specifically pleaded in accordance with O 18 r 8 of the Rules of Court 2012 ('the ROC'); (b) whether the plaintiffs' claim based on a 'finder's fee' arrangement with the defendant, albeit a 'one-off' transaction, was prohibited by virtue of s 22C(1)(d) read together with s 22B(1A)(b) or (d), of the Act; (c) whether in light of the amendments to the Act in 2011 and 2017, the decisions of the Court of Appeal in *Matad Sdn Bhd v Ng Chee Keong* [2003] MLJU 849 (*Matad*) and *Teh Eng Peng @ Teh Joo v Teh Swee Lian* [2006] 2 MLJ 305 (*Teh Eng Peng*) which examined the relevant provisions of the Act as applicable at that time, were still good law; and (d) whether the High Court ought to have ruled that regardless of the defendant's failure to plead illegality in the defence, the plaintiffs' claim ought to have been dismissed in any event, as the evidence at trial disclosed that the plaintiffs were in fact engaged in estate agency practice such that the claim was tainted with illegality.

Held, dismissing the defendant's appeal with costs of RM25,000 subject to allocatur:

(1) It was trite law that the parties were bound by their pleadings. It was not disputed that in the defence and counterclaim, the defendant did not plead any facts showing the unlawfulness or illegality of the claim and in particular that there had been a breach of the Act. It was settled law that illegality that was ex facie must be taken cognisance of by the court even if not pleaded, but in the present case, the defendant failed to plead the elements which were necessary to maintain that defence namely: (a) that the plaintiffs had held out and represented themselves as real estate agents; and (b) particularised the estate agent relationship that allegedly existed between the parties; or (c) that the plaintiffs were in the business of or practice of estate agency. This was underscored by the imperative words of O 18 r 8 of the ROC which required that the facts giving rise to illegality must be pleaded (see paras 80–81 & 96).

(2) Despite the amendments to the Act, the Court of Appeal's decisions in *Matad* and *Teh Eng Peng* remain good law. As such, a one-off or isolated real estate agency transaction would be caught by the prohibitions under the Act only if it was proven on a balance of probabilities that the plaintiffs were engaged in an estate agency practice or that there was a system of estate agency or there was an estate agency relationship. The defendant as the party which asserted that the plaintiffs' claim was tainted by illegality had the burden of proving that there was an estate agency relationship. If there was no such relationship, then the Act did not apply (see paras 84, 95 & 109).

(3) In the present case, nothing was pleaded, nothing was 'put', and nothing was proven to substantiate the defendant's belated suggestion that the plaintiffs were engaged in estate agency practice. In raising the issue of real estate agency practice (via post-trial written submission), the

defendant had clearly made a radical departure from its pleaded case. In the circumstances, it would be manifestly unjust to permit the issue of illegality to be considered. In any event, the judicial commissioner had made a finding of fact that there was no evidence of any estate agency practice and the defendant had not demonstrated that the judicial commissioner's finding in this regard could be said to be plainly wrong (see paras 95, 105–106 & 109).

[Bahasa Malaysia summary

Plaintif-plaintif tidak berdaftar di bawah Akta Penilai, Pentaksir, Ejen Harta Tanah dan Pengurus Harta 1981 ('Akta tersebut') sebagai ejen hartanah. Tuntutan plaintif-plaintif untuk bayaran pencari daripada defendan adalah berdasarkan kontrak lisan antara pihak-pihak yang mana defendan bersetuju bahawa jika plaintif-plaintif berjaya mencari hartanah yang sesuai dan mereka dapat merundingkan harga pembelian yang sesuai, maka defendan akan membayar kepada plaintif-plaintif bayaran tersebut. Plaintif-plaintif berhujah bahawa mereka telah menemui hartanah yang sesuai dan meneruskan rundingan harga untuk pembelian hartanah tersebut bagi pihak defendan, tetapi defendan telah gagal membayar baki bayaran pencari berjumlah RM545,720 kepada plaintif-plaintif. Defendan memfailkan tuntutan balas bahawa plaintif-plaintif telah memutarbelitkan nilai dan ciri fizikal tanah tersebut. Selanjutnya, dalam penghujahan bertulis selepas perbicaraan, defendan berhujah bahawa tuntutan plaintif-plaintif dicemari dengan kepenyalahan undang-undang, tetapi masalahnya adalah kepenyalahan undang-undang tidak diplid dalam pembelaan, bukan isu untuk dibicarakan dan tidak sama sekali dibangkitkan apabila keterangan telah dikemukakan semasa perbicaraan. Mahkamah Tinggi telah membenarkan tuntutan plaintif-plaintif dan menolak tuntutan balas defendan, justeru, rayuan semasa. Isu utama dalam rayuan ini ialah sama ada tuntutan plaintif-plaintif terhadap defendan untuk baki bayaran pencari dicemari dengan kepenyalahan undang-undang, iaitu tuntutan yang dilarang oleh peruntukan Akta tersebut. Isu-isu kecil yang perlu ditentukan ialah: (a) sama ada kepenyalahan undang-undang mesti diplid secara khusus mengikut A 18 k 8 Kaedah-Kaedah Mahkamah 2012 ('KKM'); (b) sama ada tuntutan plaintif-plaintif berdasarkan perjanjian 'finder's fee' dengan defendan, walaupun merupakan transaksi 'one-off', adalah dilarang menurut s 22C(1)(d) yang dibaca bersama s 22B(1A)(b) atau (d) Akta tersebut; (c) sama ada berdasarkan pindaan kepada Akta tersebut pada 2011 dan 2017, keputusan Mahkamah Rayuan dalam *Matad Sdn Bhd v Ng Chee Keong* [2003] MLJU 849 (*Matad*) and *Teh Eng Peng @ Teh Joo v Teh Swee Lian* [2006] 2 MLJ 305 (*Teh Eng Peng*) yang meneliti peruntukan berkaitan Akta tersebut sebagaimana yang terpakai pada masa itu, adalah undang-undang yang masih terpakai; dan (d) sama ada Mahkamah Tinggi sepatutnya memutuskan bahawa tanpa mengira kegagalan defendan untuk memplid kepenyalahan undang-undang dalam pembelaan, tuntutan plaintif-plaintif sepatutnya telah ditolak dalam apa jua keadaan, kerana

keterangan dalam perbicaraan mendedahkan bahawa plaintif-plaintif sememangnya terlibat dalam amalan agensi hartanah yang menyebabkan tuntutan tersebut dicemari dengan kepenyalahan undang-undang.

Diputuskan, menolak rayuan defendan dengan kos sebanyak RM25,000 tertakluk kepada alokatur:

(1) Sudah menjadi undang-undang yang mantap bahawa pihak-pihak terikat dengan pliding mereka. Tidak dipertikaikan bahawa dalam pembelaan dan tuntutan balas, defendan tidak memplidkan apa-apa fakta yang menunjukkan bahawa tuntutan tersebut menyalahi undang-undang atau kepenyalahan undang-undang tuntutan tersebut dan khususnya bahawa telah berlaku pelanggaran Akta. Undang-undang adalah mantap bahawa kepenyalahan undang-undang yang ex facie mesti diambil perhatian oleh mahkamah walaupun tidak diplid, tetapi dalam kes ini, defendan gagal untuk memplid syarat-syarat yang perlu untuk mengekalkan pembelaan tersebut iaitu: (a) bahawa plaintif-plaintif telah mempertahankan dan memperkenalkan diri mereka sebagai ejen hartanah; dan (b) menerangkan tentang hubungan ejen hartanah yang didakwa wujud antara pihak-pihak; atau (c) bahawa plaintif-plaintif berada dalam perniagaan atau amalan agensi hartanah. Ini ditegaskan melalui ayat imperatif dalam A 18 k 8 KKM yang menghendaki bahawa fakta yang menimbulkan kepenyalahan mesti diplid (lihat perenggan 80–81 & 96).

(2) Walaupun terdapat pindaan kepada Akta tersebut, keputusan Mahkamah Rayuan di dalam kes *Matad* dan *Teh Eng Peng* kekal sebagai undang-undang yang masih terpakai. Oleh itu, urus niaga agensi hartanah secara 'one-off' atau terpencil akan termasuk dalam larangan di bawah Akta hanya jika terbukti berdasarkan imbangan kebarangkalian bahawa plaintif-plaintif terlibat dalam amalan agensi hartanah atau terdapat sistem agensi hartanah atau terdapat hubungan agensi hartanah. Defendan sebagai pihak yang menegaskan bahawa tuntutan plaintif-plaintif dicemari oleh kepenyalahan mempunyai beban untuk membuktikan bahawa terdapat hubungan agensi hartanah. Jika tiada hubungan sedemikian, maka Akta tersebut tidak terpakai (lihat perenggan 84, 95 & 109).

(3) Dalam kes ini, tiada apa-apa yang diplid, tiada apa-apa yang 'diletakkan', dan tiada apa-apa yang dibuktikan untuk menyokong cadangan lewat defendan bahawa plaintif-plaintif terlibat dalam amalan agensi hartanah. Dalam membangkitkan isu amalan agensi hartanah (melalui penghujahan bertulis selepas perbicaraan), defendan dengan jelas telah membuat penyimpangan radikal daripada kesnya seperti di dalam pliding. Dalam keadaan tersebut, adalah sangat tidak adil untuk membenarkan isu kepenyalahan dipertimbangkan. Dalam apa jua

keadaan, pesuruhjaya kehakiman telah membuat dapatan fakta bahawa tidak ada keterangan tentang apa-apa amalan agensi hartanah dan defendan tidak menunjukkan bahawa dapatan pesuruhjaya kehakiman dalam hal ini boleh dikatakan sebagai jelas salah (lihat perenggan 95, 105–106 & 109).]

Cases referred to

Abdol Mulok bin Awang Damit v Perdana Industri Holdings Bhd [2003] 4 MLJ 441; [2003] 4 AMR 285; [2003] 3 CLJ 497, CA (folld)

Brilliant Team Management Sdn Bhd v South East Pahang Oil Palm Sdn Bhd & Ors [2007] 1 MLJ 536; [2006] 1 MLRH 150; [2006] 2 CLJ 1218, HC (refd)

Carol a/p Chiristopher Pelly v Puspa a/p Muniandy (Berniaga Sebagai 'Reheboth Trading') [2012] MLJU 576; [2012] MLRHU 658; [2012] 1 LNS 442, HC (refd)

Cekap Container Sdn Bhd v Lim Soon Peng & Ors [2015] MLJU 100; [2015] 3 MLRH 651; [2015] 1 LNS 154; [2015] AMEJ 239, HC (refd)

Ecofirst Hartz Sdn Bhd v Poon Mun Cheong & Anor [2018] MLJU 901; [2019] 1 MLRH 343; [2018] MLRHU 1; [2018] 1 LNS 947, HC (refd)

Goodwill Division Sdn Bhd v Low Peir Yin & Anor [2019] 9 MLJ 286; [2019] MLRHU 15; [2019] 2 CLJ 795; [2019] AMEJ 0029, HC (refd)

Lee Chee Aik & Anor v Siow Moon Yeow [2013] MLRHU 242; [2013] 1 LNS 258; [2013] 2 AMCR 227, HC (refd)

Liew Swee Yee & Anor v Metro Homes Sdn Bhd [2017] MLJU 332; [2017] MLRHU 197; [2017] 1 LNS 356; [2017] AMEJ 0335, HC (refd)

Liew Swee Yee v Metro Homes Sdn Bhd [2019] MLRHU 5; [2019] AMEJ 0005; [2019] 1 LNS 6, HC (refd)

Lim Eng Heng v Lim Sam Keow & Others [2003] MLJU 47; [2003] 6 CLJ 1; [2003] 2 AMR 520, HC (refd)

Magor and St Mellons Rural District Council Appellants; and Newport Corporation Respondents [1952] AC 189, HL (refd)

Matad Sdn Bhd v Ng Chee Keong [2003] MLJU 849; [2004] 2 CLJ 99; [2005] 1 AMR 100, CA (folld)

Mega Meisa Sdn Bhd & Ors v Mustapah bin Dorani and another appeal [2020] 6 MLJ 594; [2020] 1 LNS 1480; [2020] MLRAU 153, CA (refd)

Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay bin Abdullah [2015] 5 MLJ 619; [2015] 5 AMR 681; [2015] 8 CLJ 212, FC (refd)

Mok Shook Mooi (aka Sherene Mok) v Perbadanan Pengurusan Prisma Perdana & Ors [2016] MLJU 1570; [2016] MLRHU 1588; [2017] AMEJ 0355; [2017] 1 LNS 333, HC (refd)

North Western Salt Company, Limited v Electrolytic Alkali Company, Limited [1914] AC 461, HL (refd)

Ong Thean Chye & Ors v Tiew Choy Chai & Anor [2011] 4 MLJ 616; [2011] 1 CLJ 674; [2010] 1 LNS 1170; [2011] 1 AMR 409, CA (refd)

Poh Chat Jing v Chua Joo Cheng @ Chua Su Yin [2014] MLRHU 955; [2014] 6 AMR 723; [2014] AMEJ 1215; [2015] 4 CLJ 1107; [2014] 1 LNS 1232, HC (refd)
Teh Eng Peng @ Teh Joo v Teh Swee Lian [2006] 2 MLJ 305; [2006] 1 CLJ 249; [2007] 4 AMR 283, CA (folld)
Teh Swee Lian Lwn Teh Eng Peng @ Teh Joo dan satu lagi [1998] MLJU 265; [1998] 3 CLJ Supp 504, HC (refd)
Thomas Varkki a/l MV Varkki & Anor v Kunci Semangat Sdn Bhd [2021] MLJU 201; [2021] 1 LNS 190, HC (refd)
Yong Ngik Ching v Tony Yu Yuong Wee & Anor [2017] MLJU 696; [2017] MLRHU 446; [2017] 1 LNS 567; [2017] AMEJ 0573, HC (refd)

Legislation referred to

Legal Profession Act 1976 s 36(1)
Rules of Court 2012 O 18 r 8
Valuers, Appraisers, Estate Agents and Property Managers Act 1981 ss 2, 22B(1), 22B(1A), 22B(1A)(a), (1A)(b), (1A)(c), (1A)(d), (1A)(e), 22C, 22C(1)(a), (1)(aa), (1)(b), (1)(ba), (1)(c), (1)(d), 22C(2)(a), (2)(b), (2)(c), (2)(d), Part VA

Appeal from: Civil Suit No WA-22NCVC-384–07 of 2020 (High Court, Kuala Lumpur)

K Shanmuga (P Dinesh Kumar with him) (Kanesalingam & Co) for the defendant.
Rajashree Suppiah (Rex Kuan Kai Tat and Amira Nur Nadia bt Azhar with her) (Rajashree) for the plaintiffs.

Nantha Balan JCA (delivering judgment of the court):

INTRODUCTION

[1] The main issue in this appeal is whether the plaintiffs' claim against the defendant for the balance of what has been described as a 'finder's fee' is tainted with illegality, ie a claim which is prohibited by the provisions of the Valuers, Appraisers, Estate Agents and Property Managers Act 1981 ('the Act'). The problem here is that illegality was not pleaded in the defence and was not an issue to be tried. And the issue of illegality was not at all raised when the evidence was presented during the trial. The issue of illegality surfaced only when post-trial written submissions were filed. This is an appeal by Kunci Semangat Sdn Bhd (Co No 365006-T) ('defendant') against the decision of the learned judicial commissioner dated 7 January 2021 after a full trial, whereby the claim by Thomas Varkki a/l MV Varkki (first plaintiff — 'P1') and Amarjit Singh a/l Kartar Singh (second plaintiff — 'P2') was allowed and judgment was entered for the sum of RM545,720 with interest thereon at 5%pa from

7 January 2021 until the full payment or realization. The defendant was also ordered to pay costs of RM40,000. By the said decision the judicial commissioner also dismissed the defendant's counterclaim. P1 and P2 shall be referred to collectively as 'the plaintiffs'. The judicial commissioner's judgment is reported as *Thomas Varkki a/l MV Varkki & Anor v Kunci Semangat Sdn Bhd* [2021] MLJU 201; [2021] 1 LNS 190 (HC).

THE CLAIM

[2] The plaintiffs are not registered under the Act as estate agents. The basis for the plaintiffs' claim is that as per the defendant's request via an oral contract with the defendant's director, they had successfully identified a parcel of landed property, and negotiated the price for the property, which was eventually purchased by the defendant. The defendant made part payments totaling RM75,000 through its holding company. The plaintiffs initially filed a suit in the Sessions Court at Kuala Lumpur (Suit No WA-B52NCVC-15–01 of 2020) to claim the sum of RM545,720, being the balance of their finder's fee. The defendant, in turn, filed a counterclaim, wherein the quantum sought as part of the reliefs exceeded the monetary jurisdiction of the sessions court. The sessions court suit was therefore transferred to the High Court and registered as Suit No WA-22NCVC-384–07 of 2020.

ILLEGALITY

[3] The first issue in this appeal is whether illegality vis contravention of the provisions under the Act must be specifically pleaded in accordance with O 18 r 8 of the Rules of Court 2012 ('the ROC'). The next issue is whether the plaintiffs' claim based on a 'finder's fee' arrangement with the defendant, albeit a 'one-off' transaction, is prohibited by virtue of s 22C(1)(d) read together with s 22B(1A)(b) or (d), of the Act.

[4] In this context, the issues, when amalgamated, raise the question of whether the defendant ought to have pleaded, and put their case during the trial, and proven that the plaintiffs were engaged in estate agency practice, such that their claim is barred by the provisions of the Act.

MATAD

[5] The related issue is whether in light of the amendments to the Act in 2011 and 2017, the decision of the Court of Appeal in *Matad Sdn Bhd v Ng Chee Keong* [2003] MLJU 849; [2004] 2 CLJ 99; [2005] 1 AMR 100 (CA) (*Matad*) which examined the relevant provisions of the Act as applicable at that time, is still good law.

[6] In *Matad*, the Court of Appeal enunciated that a one-off transaction is not within the purview of the Act, but left open the possibility that 'an isolated act may amount to estate agency practice if evidence of a system of such acts is established to the satisfaction of the court'. In the latter event, the one-off transaction may well be within the purview of the Act.

[7] Perhaps the final issue is whether, as contended by the defendant, the High Court ought to have ruled that regardless of the defendant's failure to plead illegality in the defence, the plaintiffs' claim ought to have been dismissed in any event, as the evidence at trial disclosed that the plaintiffs were in fact engaged in estate agency practice such that the claim was tainted with illegality.

[8] Essentially, the dispute here relates to the meaning and scope of estate agency practice. When *Matad* was decided, the definition of estate agency practice per s 2 of the Act (pre-2011) was as follows:

> 'estate agency practice' means acting or holding oneself out, to the public as ready to act, for a commission, fee, reward or other consideration, as an agent in respect of the sale or other disposal of land and buildings and of any interest therein or the purchase or other acquisition of land and buildings and of any interest therein or in respect of the leasing or letting of land and buildings and of any interest therein.

[9] The Court of Appeal in *Matad* also examined s 22C of the Act which read as:

> 22C Restrictions on estate agency practice.
>
> (1) No person shall unless he is a registered estate agent and has been issued with an authority to practise under s 16 —
>
> (a) practise or carry on business or take up employment under any name, style or title containing the words 'Estate Agent', 'House Agent', 'Property Agent', 'Land Agent', 'House Broker' or the equivalent thereto, in any language or bearing any other word whatsoever in any language which may reasonably be construed to imply that he is a registered estate agent;
>
> (aa) carry on business or take up employment as an estate agent;
>
> ...
>
> (d) be entitled to recover in any court any fees, charges or remuneration for any professional advice or services rendered as an estate agent.

[10] The Act was amended in 2011 via the Valuers, Appraisers and Estate Agents (Amendment) Act 2011 ('Act A1404') which came into force on 19 August 2011. Section 2 of the Act was amended as highlighted below:

> 'Estate Agency Practice' means acting or holding oneself out to the public *or to any individual or firm* as ready to act, for a commission, fee, reward or other consideration, as an agent in respect of the sale or other disposal of land and

buildings and of any interest therein or the purchase or other acquisition of land and buildings and of any interest therein or in respect of the leasing or letting of land and building and of any interest therein *including the act of making known of the availability of land, building or any interest therein for such sale or other disposal, purchase or other acquisition, leasing or letting*.

[11] Thereafter, the Act was amended via the Valuers, Appraisers and Estate Agents (Amendment) Act 2017 ('Act A1550'). Pursuant to Act A1550, the long title of the Act was amended to read as 'Valuers, Appraisers, Estate Agents and Property Managers Act 1981'.

[12] The amendments via Act A1550 came into force on 2 January 2018, wherein the definition of 'estate agency practice' under s 2 of Act 242 was removed. Instead, the words of the definition and additional characteristics of estate agency practice were the subjects of the new s 22B(1A), where clauses (a)-(e) were inserted to set out the full range of activities considered to be a part of estate agency practice. The subsection that was inserted reads in full (with emphasis added) as follows:

22B (1) Estate agency practice

Subject to the provisions of this Act, a registered estate agent who has been issued with an authority to practise by the Board shall be entitled to practise his profession and shall be authorized to undertake estate agency practice.

(1A) A person *undertakes estate agency practice if he acts as an agent, or holds himself out to the public or to any individual or firm as ready to act as an agent, for a commission, fee, reward or other consideration—*

(a) in respect of any sale or other disposal of land and buildings and of any interest therein;

(b) *in respect of any purchase or other acquisition of land and buildings and of any interest therein*;

(c) in respect of any leasing or letting of land and buildings and of any interest therein;

(d) *in making known of the availability of land, building, or any interest therein for such sale or disposal, purchase or acquisition*, or leasing or letting referred to in paragraph (a), (b) or (c), as the case may be; and

(e) in respect of any tenancy administration including rental collection, payment of outgoings, arrangement for minor repairs and handing over and taking over the possession of a property of any land and buildings and of any interest therein.

[13] The appeal, therefore, turns substantially on the question of whether the judicial commissioner erred in failing to hold that the plaintiffs' claim is prohibited by the express terms of s 22C(1)(d) read together with s 22B(1A)(b)

or (d) of the Act, and consequently in failing to dismiss the plaintiffs' claim in its entirety.

[14] Section 22C(1)(d) of the Act reads as:

> (1) No person shall unless he is a registered estate agent and has been issued with an authority to practise under section 16 —
>
> ...
>
> (d) *be entitled to recover in any court any fees, commissions, charges or remuneration for any professional advice or services rendered as an estate agent*.

[15] Thus, under the above amended provisions of the Act, a person who is not a registered estate agent, or has not been issued with authority to practice under the Act is not 'entitled to recover in any court any fees, commission, charges or remuneration' for any 'professional advice or service rendered as an estate agent' without a licence: s 22C(1)(d).

[16] The services of an estate agent are defined to include among others the 'making known' of the 'availability of land, building or any interest therein' for purchase or acquisition, per s 22B(1A)(d).

[17] In mounting the illegality argument, the defendant contends that the plaintiffs' conduct falls squarely within the meaning of these provisions, and their claim is therefore barred by the Act. It was strenuously argued for the defendant that *Matad* is no longer good law in light of the amendments to the Act. Alternatively, it was argued for the defendant, that even if *Matad* were applicable, the claim is still tainted with illegality as the conduct of the plaintiffs, when examined in totality, reveals that they were involved in 'estate agency practice'. In this regard, counsel for the defendant said that even if the instant transaction was deemed as a 'one-off' or 'isolated' transaction, it is still caught by the prohibition in the Act as the plaintiffs were allegedly engaged in estate agency practice. We may now turn briefly to the factual background.

THE BACKGROUND

[18] P1 is a certified pool specialist and is the managing director of a company eponymously named Thomas Varkki (M) Sdn Bhd. He is involved in the business of building and maintaining swimming pools and ponds in Malaysia. P1 gave evidence at the trial and was identified as PW2. P2 is a building contractor and the director of Citatah AMS Contract Sdn Bhd, a construction company. P2 also testified at the trial and was identified as PW3.

[19] Around the end of 2017, P1 came to know the representative of the defendant, Dato' Sri Aminul Islam bin Abdul Nor ('Dato' Amin') after being

engaged to repair a fish pond at his residence. Dato' Amin was a director of the defendant. P2 was a contractor and was doing renovation works for Dato' Amin at his residence. Whilst the plaintiffs were at Dato' Amin's residence, there was a discussion (in the gazebo) in regards to Dato' Amin's intention to purchase (through his company — the defendant) property for the purposes of building a worker's hostel.

[20] The plaintiffs' case is predicated on an oral contract. The plaintiffs' evidence was that Dato' Amin, on behalf of the defendant had via an oral contract with the plaintiffs, agreed that if the plaintiffs succeeded in locating a suitable property and they are able to negotiate a suitable purchase price, then the defendant would pay the plaintiffs a 'finder's fee'. The plaintiffs contend that they located a suitable property and proceeded to negotiate the price for the purchase of the said property on behalf of the defendant.

[21] In this regard, P1 introduced a property that belonged to his childhood friend, Regoovaran a/l Paramu ('land owner'). the land owner owned property in Sentul, Kuala Lumpur and held under Mukim Grant 1611, Lot No 163, Section 84, Kuala Lumpur City, Kuala Lumpur District, State of the Federal Territory of Kuala Lumpur having an area of 31,035.48 sqft ('the land'). P1 was of the view that the land would be suitable for Dato' Amin's requirement.

[22] According to the plaintiffs, Dato' Amin verbally promised and agreed to pay them a finder's fee of RM20 per square foot ('psf') based on the area of the property to be identified and acquired. P1 testified that Dato' Amin visited the land with P2. P2 in turn testified that he was the one who picked up Dato' Amin and took him to inspect the land.

[23] Dato' Amin then requested for a valuation report. The land owner provided a valuation report which was prepared by Sulaiman & Co dated 6 December 2017 which stated the market value of the land as RM13m, which is roughly equivalent to RM420 psf. According to the said valuation report, comparable properties fetched a market price of RM321 psf to RM541 psf. P1 forwarded the said valuation report to Dato' Amin. Dato' Amin wanted the plaintiffs to negotiate down the price so that the defendant may buy the land at a lower price than the amount that was asked for by the land owner.

[24] The land owner's asking price was RM350 psf. Dato' Amin verbally promised the plaintiffs that if they could negotiate with the land owner to sell the land at RM280 psf, then Dato' Amin will pay the plaintiffs RM20 psf based on the land footage.

[25] According to the plaintiffs, they had fully performed their part of the bargain as they had successfully identified the land and negotiated down the price with the land owner from the asking price of RM350 psf to RM280 psf. A

[26] On 12 March 2018, the defendant entered into a sale and purchase agreement with the land owner for the purchase of the land with the land owner at a purchase price of RM8,689,934.40 ('SPA'). The defendant obtained banking facilities from Maybank Islamic Bhd ('the Bank') to part-finance the purchase of the land. The transaction under the SPA was duly completed and the land was registered in the name of the defendant on 22 June 2018. However, Dato' Amin was not happy because the bank's valuers, Messrs Nasir, Sabaruddin & Associates, had given an open market valuation for the land at RM8,690,000 and a forced sale value of RM6,080,000. Dato' Amin decided to dispose of the land. He asked P1 to look for a buyer. P1 asked for a letter of authorisation. But the letter was not forthcoming. Eventually, Dato' Amin accused P1 of misrepresentation, inter alia, as to the value of the land. B C D

[27] The plaintiffs' case is that in accordance with the oral agreement, they are entitled to payment of RM620,720 ('agreed fee'), as the square footage of the land was approximately 31,036 sqf (ie, RM20 x 31,036 sqf = RM620,720). The defendant made part payments (RM75,000) through its holding company, JR Joint Resources Sdn Bhd, but failed or refused to pay the balance, ie RM545,720 (ie, RM620,720 less RM75,000). E

[28] As alluded to earlier, the issue of illegality was not pleaded in the defence and was also not crafted as an 'issue to be tried' (as per pre-trial case management directions). F

[29] The issue of illegality ie contravention of the Act was not canvassed when the evidence was presented during the trial. It was only brought belatedly up for the first time in the post-trial written submissions. It is quite obvious from the pleadings and the issues to be tried, that the defendant was not relying on illegality. It is relevant to mention that during the trial, the defendant's efforts were directed at establishing that the payment of RM75,000 was done on a 'goodwill' basis and that there was 'no agreement' to pay RM20 psf based on the footage of the land, and lastly *to bolster the counterclaim* that the plaintiffs had misrepresented the value and physical characteristics of the land. G H

[30] However, the issue that was canvassed during post-trial submissions before the High Court was whether the plaintiffs were carrying out 'estate agency practice' by their conduct despite not being registered as estate agents and whether such conduct is prohibited under Act. As we said earlier, a sub-issue is whether the decision of the Court of Appeal in *Matad* is still good law in light of subsequent amendments to the Act. I

[31] At the outset, it should be stated that this appeal is only concerned with the decision of the judicial commissioner in so far as the plaintiffs' claim was allowed. The defendant is not pursuing the appeal against the dismissal of the counterclaim. The counterclaim was predicated on an allegation of 'misrepresentation' as to the value of the land and as to its physical characteristics. All of that has since fallen by the wayside.

[32] The sum of RM 545,720 which was claimed by the plaintiffs is effectively a 'finder's fee' although the contemporaneous documents made reference to a 'consultancy fee'. But we do not think that the label makes any difference to the issue(s) at hand.

[33] The plaintiffs' position is that this transaction was a one-off event that came about by happenstance by the parties being at the right place at the right time, that is to say when they were working at Dato' Amin's residence, and him sharing about his interest in a property for his business on the one hand and P1 having a childhood friend who was looking a buyer for his property in the vicinity and all the discussions and conversation casually taking place in Dato' Amin's gazebo with his two contractors (the plaintiffs) and nothing whatsoever to suggest that an estate agency practice was in progress or that there was a system of estate agency practice by the plaintiffs, or that there was any estate agency relationship arising between them.

THE ORAL CONTRACT — P1'S TESTIMONY

[34] P1 explained (per his witness statement) the terms of the oral contract and the work that was done in that respect. P1 said:

> Q7: What was the terms for you to provide these Services?
>
> A7: The director of the defendant, Dato' Amin had verbally promised and agreed to pay us RM20.00 per square feet ('psf') according to the area of the property to be identified and acquired in accordance with the Services ('the Agreement').
>
> Q9: What happened next?
>
> A9: After putting in lots of effort, we had identified a piece of property which was suitable for Dato' Amin's requirement. The Property is held under Mukim Grant 1611, Lot No. 163, Section 84, Kuala Lumpur City, Kuala Lumpur District, State of the Federal Territory of Kuala Lumpur having an area of 31,035.48 square feet ('the Property'). We then introduced the Property to the defendant through Dato' Amin.
>
> Q10: What was the response of the defendant?
>
> A10: When we brought the Property for sale to the attention of Dato' Amin, he showed interest in the Property.
>
> At the time, the defendant and JR Joint Resources Holdings Sdn Bhd a company where Dato' Amin is also director had their business office at 15, Jalan 15/48A

Sentul Raya, Off Jalan Sentul Kuala Lumpur. Dato' Amin was interested in the Property as the Property was suitable to be developed into a workers' hostel. This he indicated was good for his business which is for manpower supply.

Q11: What did the defendant do?

A11: Dato' Amin had visited the Property and requested for a valuation report and I then forwarded a land valuation report prepared by the owner of the Property dated 29.11.2017 ('valuation report') to him. The valuation report indicated that the market value of the Property was RM13,000,000.00. The valuer found that comparable properties fetched a market price of RM321 psf to RM541 psf.

Q12: What is the document at pages 17-35 of the Common Bundle of Documents (Part A & B)?

A12: This is the valuation report prepared by the owner of the Property dated 6.12.2017 by Messrs Suleiman & Co who are chartered surveyors, valuers and property managers. This report was prepared and signed off by Suleiman Ahmad B Sc. (Est Man.) Reading, FRICS, FIS(M), LLB (Hons.) Lond., CLP. Chartered Surveyor & Registered Valuer (V-053), who also the director of the property consultant company.

Q13: What are the documents at pages 14–16 of the Common Bundle of Documents (Part A & B)?

A13: This is the previous issue document of title of the Property under the name of previous owner of the Property, i.e. Regoovaran A/L Paramu.

Q14: What happened next?

A14: Dato' Amin wanted us to negotiate down the price so that the Property may be acquired at a lower price than the amount which was asked for by the owner of the Property. At the time, the owner's asking price was RM350.00 psf.

Q15: Then?

A15: Dato' Amin promised that if we could negotiate with the owner of the Property to sell the Property at the rate of RM280.00 psf, then he will pay us RM20.00 psf in accordance with the Property footage. This will give us the mutual benefit as the defendant would be able to acquire the Property at a costs of RM300 psf that is at approximately RM280.00 psf for them while we will earn RM20.00 psf.

On that basis, we through our hard work and efforts managed to successfully negotiate down the price to RM280.00 psf which is about RM8,700,000.00.

As far as we are concerned, we had successfully identified the Property and negotiated down the price with the owner of the Property from the price of RM350.00 psf to RM280.00 psf. This means we have fully performed our duty in respect of the Services. Due to our Services, we have successfully negotiated down the price to almost RM2,172,483.60 lesser [(RM350 x 31,035.48 sf) – (RM280 x 31,035.48 sf)/ RM 10,862,418–RM8,689,934.40] for the defendant.

I believe that the defendant themselves relied on the sum of RM300 psf because that should be the actual costs for the defendant in buying the Property. The rate of RM300.00 psf only arises because the defendant had taken into account the payment for our Services. (RM280.00 psf for the acquisition of the Property and

RM20.00 for payment for our Services). That is why I think that the defendant had assessed the purchase of the Property at the price of RM300.00 psf. But they never paid us. (Emphasis added.)

[35] As mentioned earlier, the issue of the plaintiffs holding themselves out as estate agents, or that they were engaged in estate agency practice was not pleaded, and was not canvassed during the trial.

[36] In fact, during cross-examination, P1 was asked whether he was a real estate agent. P1 answered in the negative. The issue did not go any further:

RT: Now, are you a real estate agent?

PW2: I was never a real estate agent.

[37] Thus, the issue of P1 not being a real estate agent was not pursued any further during cross-examination. During re-examination, P1 in fact said that *his claim had nothing to do with real estate agency* and that it was *based on a mutual agreement*. He gave the following evidence:

RS: Mr Thomas, so there was one line of questionare [sic] here, about are you a real estate agent, do you know what the usual fees for a real estate agent during on and then do you know that your fees or agreed fees is amount higher is event what a real estate agents were earned and then you said you were responding something and then you just I don't agree, you want to explain that?

PW2: Yes I don't agree because *this has got nothing to do with real estate agent, I'm not the real estate agent and all that, this was very mutual agreement* when he said Thomas you save me so much of money, I will give you this RM20 if you can do that, you come back to me so it has got nothing to do with real estate agent and all that, *I'm not the real estate agent. I just working for as a finder's fee, it considered as finder's fee* I find nice lot land for you, you accepted you want me to get at your price, you will save 2 or millions and you give me RM20 because of that for 3 months I'll be working on the property and I got it done. It was so easy to sell I would sold it within one two weeks. It was not that easy, it's not so easy to convince the seller also. (Emphasis added.)

[38] It is pertinent to point out that the defendant never put it to the plaintiffs that they were engaged in estate agency practice. Further, P1's evidence that the claim 'has got nothing to do with real estate agent' was not challenged which means that as a matter of evidence, the defendant accepted, *sub-silentio*, that the plaintiffs' claim was not a claim based on real estate agency.

[39] Indeed, the main thrust of the cross-examination of P1 was to establish that there was 'no agreement' for the defendant to pay RM20 psf consequent upon the purchase of the land by the defendant. Counsel for the defendant in fact went so far as to say that the sum of RM75,000 was paid on a 'goodwill basis':

RT: Now, I'm putting it to you that was no agreement to pay you for that matter Mr Amarjit the sum of RM20 per sq. ft. for the sale and purchase of the sale land, you agree?

PW2: Agree.

RT: Now, I'm putting it to you that Dato' Amin merely agreed to pay you on good will basis which he did in the sum of RM75,000.00?

PW2: His bound or his work and he said RM20?

[40] During cross-examination, the defendant's counsel suggested that it was P1 who raised the topic of the purchase of the land rather than Dato' Amin. P1 stood firm and said that it was Dato' Amin who brought up the topic. In re-examination, P1 explained that it was Dato' Amin who approached the topic of buying a parcel of land. His testimony was as follows:

65. Now, I go back from the beginning of these afternoon ya. So, Mr Thomas just to clarify, my learned friend kept putting to you that you are the one who proposed the land to Dato and it was not at his request and you said I totally disagree, do you want to explain that?

I was doing a lot of work at his house and he was always telling me to look for a property because he is to man power supply, he was build up hostel and everything and coincidentally this particular land just come in the right time and this particular land was so close to his office. So, I told him there is a nice piece of land 'Dato, are you interested', he went and had a look, he was so excited because the LRT was there he said the workers are so easy transport is that everything, he was so happy, he started arising me for the land and must get the land for him. So, that is when it started off.

MEMORANDUM OF APPEAL

[41] The appeal, therefore, turns solely on the issue of illegality and the salient parts of the memorandum of appeal ('MOA') read as follows:

1. The learned judicial commissioner erred in law in failing to dismiss the whole of the Respondents claim (as plaintiffs in the High Court) on the grounds that their claim was

1.1. forbidden by the express terms of Part VA of the Valuers Appraisers and Estate Agents Act 1981 ('Act 242') and in particular section 22C (1)(d) read together with section 22B(1A) (b) or (d) which prevents a person from recovering in any court 'any fees, commissions, charges or remuneration' for any 'professional advice or services rendered as an estate agent', where the services of an estate agent include 'the making known the availability of land, building or any interest therein' for purchase or acquisition;

1.2. was of such a nature that, if permitted, would defeat the law as aforesaid, or

1.3. was otherwise opposed to public policy or tainted with illegality,

and hence the underlying agreement which was the basis of the Respondents claim was void pursuant to section 24(a) or (b) or (e) of the Contracts Act 1950 (Act 136).

2. Further or in the alternative, the learned judicial commissioner erred in law in considering that illegality must be pleaded pursuant to Order 18 rule 8 of the Rules of Court 2012, and failed to take into account the long standing principle of law most recently reiterated by the Federal Court in *Merong Mahawangsa Sdn Bhd & Anor. v Dato' Shazrul Eskay Abdullah* [2015] 8 CLJ 212, FC that illegality need not be pleaded and that a Court must take note of illegality and refuse to enforce contracts which are on the face of it illegal.

3. Further, the learned judicial commissioner erred in law in relying on the Court of Appeal decision in *Matad Sdn Bhd v Ng Chee Keong* [2003] MLJU 849; [2004] 2 CLJ 99, CA where the Court of Appeal in *Matad* themselves erred in law in considering that the prohibition in section 22C(1)(d) of Act 242 only prohibited 'estate agency practice' which required evidence of a 'practice' of more than one acts of services provided as an estate agent and in failing to consider the following:

3.1. Act 242 is a piece of social legislation to regulate the professional practice of valuers, appraisers, and estate agents and protect members of the public from unlicensed and unregulated persons providing services which can only be provided by licensed professionals;

3.2. As such, the prohibition in section 22C of Act 242 must be interpreted in light of similar prohibitions contained in legislation regulating other professionals; and

3.3. In the circumstances, the Court erred in law in failing to find that even a single transaction which infringed the provisions of Act 242 should be considered an offending act of estate agency practice to which the prohibition in section 22C(1)(d) applied.

4. Further, the learned judicial commissioner erred in law by failing to appreciate the recent amendments made to Act 242 in October 2017 (through Act A1550), after the decision in *Matad*, whereby in particular, clauses 22B(1A)(a)-(e) were included in Act 242 specifically identifying the type of activities that comprised the Respondents' pleaded case were considered to be estate agency practice.

5. Further or in the alternative, the learned judicial commissioner erred in law in failing to find that the actions of the Respondents according to their very own pleaded case and from the evidence before the Court did encompass a prohibited course of action as an estate agency practice which was prohibited by Act 242 and hence section 22C(1)(d) applied to prohibit recovery of the commission claimed by the Respondents in that

5.1. the Respondents by their pleaded cases said they went out to look and identify a potential property for purchase by the Appellant;

5.2. the Respondents then located the suitable property and proceeded to negotiate the price for the purchase of the said property on behalf of the Appellant; and

5.3. upon learning of the Appellant's dissatisfaction with the purchase, represented that they had procured a new buyer for the property and offered to

negotiate the sale of the property to the said new buyer.

6. The learned judicial commissioner erred in law and in finding of fact in

6.1. considering that an estate agent's fees are paid by the Vendor of the property, and failing to take into account that a registered estate agent can be appointed either by Vendor or Purchaser and express prohibitions exist to regulate their professional practice in Part X of the Valuers Appraisers and Estate Agents Rules 1986 [P.U (A) 64/1986] ('the Rules') including a prohibition for acting for more than one party [Rule 93] or collecting a fee from both sides to a transaction [Rule 89(2)];

6.2. failing to take into consideration that the so called commission charged by the Respondents which was awarded by the Court was more than double the maximum fee of 3% of the purchase price that can be charged by a registered estate agent pursuant to Rule 48 and the 7th Schedule of the said Rules unless with written permission of the Board of Valuers Appraisers and Estate Agents pursuant to Rule 89(1) of the Rules.

THE HIGH COURT

[42] Essentially, the question in this appeal is whether the judicial commissioner had misdirected himself in failing to dismiss the plaintiffs' claim in its entirety on the basis that the plaintiffs' claim is forbidden by the express terms of s 22C(1)(d) read together with s 22B(1A)(b) or (d) of the Act.

[43] Under the above provisions of the Act, a person who is not a registered estate agent or has not been issued authority to practice under the Act is 'not entitled to recover in any court any fees, commission, charges or remuneration' for any 'professional advice or service rendered as an estate agent' without a licence: s 22C(1)(d). The services of an estate agent are defined to include among others 'making known' of the 'availability of land, building or any interest therein' for purchase or acquisition: s 22B(1A)(d).

[44] The defendant contends that the plaintiffs' conduct on which the claim is predicated, falls squarely within the meaning of these provisions, and their claim is therefore barred by statute. In dismissing the defendant's argument, the judicial commissioner ruled the defence of illegality was not available to the defendant, inter alia, because it was not pleaded. Nevertheless, the judicial commissioner proceeded to consider the issue of illegality and rejected the argument based on the decision of *Matad* which His Lordship considered as binding on him.

[45] The judicial commissioner dealt with the illegality issue in the following manner as may be seen in paras 86–93 of the grounds of judgment. On the issue of the defendant's failure to plead illegality, the judicial commissioner held that such failure to plead was fatal due to non-compliance with O 18 r 8

of the ROC.

[46] The judicial commissioner also applied the principle that was enunciated by the Court of Appeal in *Mega Meisa Sdn Bhd & Ors v Mustapah bin Dorani and another appeal* [2020] 6 MLJ 594; [2020] 1 LNS 1480; [2020] MLRAU 153 (CA) (*Mega Meisa*) where the defendant had not pleaded illegality vis contravention of the Act. The relevant part of the grounds of judgment reads as:

> Valuers, Appraisers, Estate Agents and Property Managers Act 1981 ('Estate Agents Act')
>
> 86. In submissions, the defendant argued that the plaintiffs' claim is illegal and an offence under s 30 of the Estate Agents Act. Reason being that the plaintiffs' claim is for alleged commission payable by the defendant for purchase of the land. However, the plaintiffs are not registered estate agents. As such, the plaintiffs are prohibited from recovering any commission for any professional advice or services rendered as an estate agent.
>
> The defendant did not plead contravention of Estate Agents Act
>
> 87. I disregarded this argument simply because the defendant did not plead illegality. Under O 18 r 8 of the Rules of Court 2012 ('Rules of Court'), illegality is expressly identified as a matter which must be specifically pleaded. Nowhere in its defence had the defendant pleaded any facts showing the illegality of the plaintiffs' claim or a contravention of the Estate Agents Act. This issue was not raised in the defendant's 'Summary of Case' nor included in the 'Issues to be Tried' documents prepared during pre-trial case management pursuant to O 34 of the Rules of Court. At the trial, the defendant's solicitor cursorily asked P1 whether he was a real estate agent and alluded to the fact that the agreed fee was higher than the usual commission earned by a real estate agent. However, there was no cross-examination or questions 'put' to the plaintiffs regarding the alleged breach of the Estate Agents Act.
>
> No evidence was elicited from the defendant's own witness that the plaintiffs' claim was not maintainable for contravention of the Estate Agents Act. The defendant's submission clearly amounts to a radical departure from its pleaded case and should not to be allowed.
>
> 88. I followed the Court of Appeal case of *Mega Meisa Sdn Bhd & Ors v. Mustapah Dorani & Another Appeal* [2020] 6 MLJ 594; [2020] 1 LNS 1480; [2020] MLRAU 153. *In that case, the defendant had failed to plead the issue of illegality in its defence and also during the trial stage but raised it for the first time in its written submission. The defendant in that case had submitted on the same statute ie, the Estate Agents Act*. The Court of Appeal said at (MLJ p 630; CLJ p 34):
>
> > [101] Relying on recital (3) of the JV agreement, the defendant submitted that the JV agreement is illegal and unenforceable. The essence of the plaintiff submission is as follows:
> >
> > (a) the plaintiff carried out estate agent practice in breach of s 21(1)(aa) or (c) or s 22(1)(aa), (ba), (c) or (d) of the Value, Appraisers and Estate Agents Act 1981;

(b) the plaintiff is not registered as a valuer of an estate agent; and

(c) the plaintiff undertaking in the JVA is in clear violation of ss 21(1)(aa) or (c) or (d) of the Value, Appraisers and Estate Agents Act 1981.

[102] Learned counsel for the plaintiff argued that the defendants have failed to plead the issue of illegality in their defence and also during the trial stage. As such, the appellant by raising the issue of illegality at the appeal stage must not be taken into account as the respondent shall not be caught by surprise.

[103] It is observed that the agreed issues to be tried before the learned High Court judge did not concern the defendant's allegation of illegality. We observed that the issue of illegality was raised by the defendant for the first time in its written submission before the High Court. We have perused the notes of proceedings and we found that the issue of illegality was also not raised by learned counsel for the defendant during trial.

[104] Hence in our view, the learned High Court judge is correct in not deciding on the issue of illegality. *In fact, the issue relates to illegality is not in their pleadings. We have perused the entire defences filed by the defendant, we find the issue of illegality was not pleaded by the defendant.* Therefore, we are of the opinion that there is no error by the learned judge in not addressing this issue.

[105] The Federal Court in *Dato' Hamzah bin Abdul Majid v Omega Securities Sdn Bhd* [2015] 6 MLJ 725; [2015] 6 MLRA 677, the Federal Court ruled that any radical departure from the pleaded case which is not just a variation, modification or development of what has been alleged in the pleading in question, must be specifically pleaded. Any unpleaded matter ought to be disregarded by the court. In the present appeals, it is our finding that the issues relating to illegality as raised by the defendant clearly amounted to radical departure from the pleaded case of the defendant as appeared in its defence and therefore ought not to be allowed.

89. If I were to allow the defendant to raise this issue concerning contravention of the Estate Agents Act in its submission, *it would be akin to trial by ambush. It will take the plaintiffs by surprise to their detriment and cause irreparable prejudice. The plaintiffs would have been denied the opportunity to adduce evidence against the application* of the provisions of the Act. I am guided by the Court of Appeal case of *Pendaftar Hakmilik Negeri Selangor v Caesius Development Sdn Bhd & Ors and another appeal* [2020] MLJU 25; [2020] 3 CLJ 327; [2020] 3 MLRA 54 at p 62 which said (dealing with the issue of limitation):

[16] We have painfully considered this issue. With due respect to the learned ALA, we find this argument would only be relevant if it had been raised at the outset of the trial before witnesses were called because it goes to the jurisdiction of the court. But not when it was raised only during the submissions stage, after eight days of full trial had been completed with witnesses called by all parties who had completed giving their evidence. This court must not allow this to become a practice. Much time had been spent to hear witnesses, and to allow this issue, which goes to the jurisdiction of the court, is like conducting a trial by ambush.

The plaintiffs did not carry out estate agency practice (to place under para 44 below).

[47] At any rate, despite his ruling that the defence of illegality was not available as it was not pleaded, the judicial commissioner in the present case nevertheless went on to deal with and made a ruling on the issue. And this may be gleaned from the following paragraphs of His Lordship's judgment which reads as:

Plaintiffs did not carry out estate agency practice

90 In case I am wrong, I proceeded to deal with this issue of illegality.

It is my finding that the plaintiffs did not carry out estate agency practice in contravention of the Estate Agents Act.

There is no evidence of a system or of a course of conduct which show Plaintiffs carrying on estate agency practice or business. DW1's own evidence is that he was dealing with P1 as a trusted friend. There is no mention of DW1 treating P1 as a real estate agent or being in the business of estate agency. There is no evidence of Plaintiffs holding themselves out or representing themselves as real estate agents. There is only evidence regarding the purchase of the land, which is a one-off transaction or an isolated act. D never pleaded or adduced evidence or put a case to Plaintiffs that an estate agent relationship existed between the parties. Accordingly, it is my opinion that the Estate Agents Act has no application in the instant case.

91. I followed the Court of Appeal case of *Matad Sdn Bhd v Ng Chee Keong* [2003] MLJU 849; [2004] 2 CLJ 99 which expounded on how the Estate Agents Act is to be interpreted and applied. The court explained that *section 22C of the Estate Agents Act* must be interpreted contextually and that words such as *'practise', 'carry on business'* point to a course of conduct, not to an isolated act. The court said at p 105:

> ... well-settled principle that words appearing in a section in a statute must be read in their proper context. This is in accordance with well settled guidelines for the interpretation of statutes. We will, later in this judgment, refer to authority that supports our view. What we need say for the present is that the word 'acting' in the definition clause must be read contextually, that is to say, in the context of s 22C. That section contemplates someone who 'practises as' or who may 'carry on business' as 'an estate agent' (see s 22C(1a) and (aa)). Special notice should also be taken of the use of the word 'practise' in the opening words of s 22C(1).
>
> Two points need to be made immediately. First, the section uses language that requires some system. Words such as 'practise', 'carry on business' point to a course of conduct: not to an isolated act. It is not unlike the Moneylenders Act cases. There too, a course of conduct or system is called for:

92. Applying *Matad* to the present case, *my view is that the plaintiffs did not practise or carry on business as real estate agents. Their involvement in the defendant's purchase of the land was an isolated act. The defendant argued that later on when it expressed unhappiness over the purchase of the land, the plaintiffs offered to find a buyer to take the land off from the defendant.*

However nothing turns on that as no transaction ensued. The plaintiffs cannot be said to

be carrying on the practice of estate agency based on a one-off transaction, in the absence of some evidence of a system or continuity in their conduct or activity.

93. One final point I would mention is this. My understanding of estate agency practice is that it is the seller (ie, the land owner) who pays commission to the estate agent. In the instant case, the agreed fee was to be paid by the buyer (ie the defendant). Furthermore, the defendant (through DW1) in insisting that it had dealt with P1 as a friend only, had *failed to prove that an estate agent relationship existed between the parties*. In this regard, the Court of Appeal case of *Teh Eng Peng & Anor v Teh Swee Lian* [2006] 2 MLJ 305; [2005] 1 LNS 216; [2004] 2 MLRA 717 is instructive. The court said at pp 721–722:

> In the present case as emphasised by the learned judge, there was not in existence a system or a course of conduct which go to show that the respondent was practising or carrying on business as an estate agent. The transaction in question was just an isolated transaction. Further we found that there no 'estate agency relationship' existing between the respondent and the land owners, including the first appellant. What happened was that the land owners requested the respondent to look for potential buyers of the said lands and if successful the respondent will be paid a commission. There was nothing to show that the respondent had offered any professional advice or other services to the 151 appellant as an estate agent. Further the respondent here was a close relation of the 151 appellant and as stated earlier his father was one of the co-owners of the said lands. In our judgment all these facts conjointly negative the existence of 'estate agency relationship' between the parties.

THE DEFENDANT'S ARGUMENTS

[48] Counsel for the defendant made the following arguments in support of his position that the plaintiffs' claim was tainted with illegality and should be dismissed. Essentially counsel submitted that the Act (as amended) is directed at or covers all real estate transactions and includes even a 'one-off' or 'isolated' real estate transaction. He said that real estate agency work is a profession and as such, even a single act of transgression of the Act is sufficient to bar a claim.

[49] Counsel gave the legal profession as an example and said that under the Legal Profession Act 1976, no person shall practice as an advocate and solicitor unless he has been admitted to practice and holds a valid annual practicing certificate. Counsel said that similarly the prohibition under the Act is absolute. Likewise, counsel invited us to hold that even a single one-off real estate transaction is caught by the prohibition under the Act.

[50] In amplification, counsel for the defendant made the following points. Counsel first emphasised that s 22B(1) of the Act states that a 'registered estate agent' is one who has been 'issued with authority to practice' and entitled to 'practice his profession' and 'shall be authorised to undertake estate agency practice'. Estate agency is clearly now stated to be a 'profession'. There is

A expressly stated that an agent may 'practice' his profession (which indicates the authority to embark on a systemic nature), and it is further stated that the agent is authorised 'to undertake estate agency practice'. The term 'estate agency practice' is then defined in s 22B(1A). It is akin to a deeming provision. Counsel for the defendant said that the relevant opening words of s 22B(1A) B are all in the singular and state that '*A person* undertakes estate agency practice if he acts as *an agent* or holds himself out to the public or to *any individual* or firm as ready to act as an agent, for a commission ...'. The word '*any*' is defined as 'one' in *The Concise Oxford Dictionary* (5th Ed). Then follows subsections (a) to (e) of subsection (1A). Again, each of those activities is preceded by the word C 'any'. Nothing in the two subsections indicate any requirement at all for there to be a system in place.

[51] Counsel said that, that usage must now be considered in the light of the different ways in which the word is used in sub-s 22B(1): 'practise his D profession' (the verb) and undertake 'estate agency practice' (the noun). Only the latter is defined in s 22B(1A). Counsel then referred to s 22C(1)(a)-(d) of the Act which lists down the main 'restrictions on estate agency practice'. Counsel pointed out that the prohibitions are there set out in disparate subsections. He then invited us to look at the individual sub-paragraphs, some E of which use the word 'practise' (as a verb) and some use the word 'carry on business' eg paras (a) and (aa).

[52] On the other hand, the other paragraphs contain absolute prohibitions F on certain actions. For example, para (ba) contains a blanket restriction on the 'offer for sale, rent or lease or invite offers to purchase, rent or lease ...'. It does not say 'practise or carrying on business offering for sale, rent or lease', as paras (a) and (aa) do. Counsel also drew our attention to the end of para (b), where a distinction is drawn between 'estate agency practice' and 'business'.

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[53] Thus, it was submitted that where the legislation requires a system of activity, the word 'practise' (as a verb) or 'carry on business' is used. But in other situations, the plain and ordinary meaning of the words show that all that is required is a one-off prohibited activity to come within the definition of 'estate H agency practice'. Counsel said that it must be assumed that the drafter took great care in formulating all these words.

[54] He said that it is an accepted principle of interpretation that the court is bound to assume that Parliament is aware of the law and acts as an 'ideal I legislative body' and that the legislation has been competently drafted. See *Bennion on Statutory Interpretation* (7th Ed), s 9.3.

[55] Counsel also submitted that where different words are used, it is a principle of statutory interpretation that the drafter is presumed to have

intended to achieve different results: *Bennion on Statutory Interpretation* (7th Ed), s 21.3. Counsel contended that the amendments to the Act were implicitly intended to repudiate the principles that were enunciated by the Court of Appeal in *Matad*.

[56] Counsel's next point was that under s 22C(2)(a)-(d) of the Act, exceptions are provided to allow individuals who are not real estate agents to carry out certain transactions. Reference was made to paras (a) and (c) which provide as follows:

> (2) Notwithstanding subsection (1) —
>
> (a) *an owner* of any land, building and any interest therein may sell or rent or lease or sublease, or offer to sell or rent or lease or sublease, such land, building and interest;
>
> ...
>
> *(c) a holder of a power of attorney in respect of any land, building and any interest therein, acting gratuitous and for no commission, fee, reward or other consideration, may sell, purchase or rent, or offer to sell, purchase or rent, such land, building and interest.*

[57] It was therefore contended for the defendant that if indeed it was the intention of Parliament to only include systemic estate agency practice, there would be no need to include these individual actions as exceptions under s 22C.

[58] According to counsel, the answer to the hypothetical question posed in the course of argument as to the situation of one-off transactions of introducers being promised fees lies in s 22C(c). Hence, such introductions must be gratuitous and any payment promised must be something done on a friendly basis. It was contended that a contractual arrangement to be paid any fee or commission, even for isolated or one-off transactions, cannot be enforced in any court.

[59] Counsel emphasised that the so-called commission charged by the plaintiffs and which was awarded by the High Court was more than double the maximum fee of 3% of the purchase price that can be charged by a registered estate agent.

[60] Counsel's closing argument was that if unlicensed or unregistered persons (like the plaintiffs) are allowed to charge these high commissions in land transactions without being licensed or subject to the safeguards of the Act, it will defeat the intention of Parliament in seeking to regulate this aspect of the economy to protect consumers and those buying land (like the defendant). In closing, counsel for the defendant contended that post amendment to the Act, *Matad* is no longer good law.

A PLAINTIFFS' ARGUMENTS

[61] For the plaintiffs, it was argued that in light of the fact that illegality was not pleaded and not pursued (or put) during the trial, the defence (even if applicable) was not available to the defendant as there was non-compliance with O 18 r 8 of the ROC.

[62] It was submitted for the plaintiff that the amendments which were introduced, do not affect the reasoning and ratio decidendi of *Matad* and the Court of Appeal's decision in *Teh Eng Peng @ Teh Joo v Teh Swee Lian* [2006] 2 MLJ 305; [2006] 1 CLJ 249; [2007] 4 AMR 283 (CA) (*Teh Eng Peng*), as the prohibitions defined by the 2017 amendments and the terminology 'estate agency practice' existed prior to the amendments in 2011 and 2017 and was not changed in substance by either amendment.

[63] According to counsel for the plaintiffs, the amendments in 2011 still define and focuses on 'estate agency practice' but added that acting and holding out does not have to be to the public at large only, that it could be 'to any individual or firm'. Secondly, that being ready to act as an agent for a sale, disposal, acquisition lease or tenancy included 'making known the availability of the land building or other interest' for sale or other disposal, purchase or other acquisition, leasing or letting.

[64] Continuing with her submissions, counsel said that with respect to the amendments made in 2017, the main difference is that, prior to 2017, 'estate agency practice' was defined in the *definition section*. However, after the 2017 Amendments the terminology 'estate agency practice' was deleted from the definition section (s 2 of the Act) and was provided for *within the body of the Act under Part VA*. The amendments were not a matter of substance but rather was only in the re-formatting of the Act.

[65] Counsel emphasised that even after the amendments, the prohibited activity is therefore still 'estate agency practice' which requires proof that the claimant was *someone who 'practises as' or who 'carried on business' as 'an estate agent'*.

[66] Apart from relying on the pronouncements made by the Court of Appeal case in *Matad* and *Teh Eng Peng*, counsel for the plaintiffs also relied on *Ong Thean Chye & Ors v Tiew Choy Chai & Anor* [2011] 4 MLJ 616; [2011] 1 CLJ 674; [2010] 1 LNS 1170; [2011] 1 AMR 409 (CA) (*Ong Thean Chye*) where the Court of Appeal held:

> It is our judgment that a single isolated act may amount to an *estate agency practice if evidence of system is established*. In *Matad Sdn Bhd v Ng Chee Keong* [2003] MLJU 849; [2003] 2 MLRA 499; [2004] 2 CLJ 99; [2005] 1 AMR 100, *Gopal Sri Ram*

JCA (later FCJ) speaking for this court had this to say at p 107 of the report:

> *It is we think appropriate at this stage to mention two conflicting decisions of the High Court, on the interpretation of the Act. In Teh Swee Lian lwn Teh Eng Peng @ Teh Joo dan satu lagi* [1998] MLJU 265; [1998] 3 CLJ Supp 504, *Azhar Maah J correctly held, on the facts before him that an isolated act did not constitute a holding out by the plaintiff and that evidence of system was necessary to prove estate agency practice.*

[67] In *Ong Thean Chye* the Court of Appeal adopted a summary by Justice Low Hop Bing (later JCA) in *Brilliant Team Management Sdn Bhd v South East Pahang Oil Palm Sdn Bhd & Ors* [2007] 1 MLJ 536 at p 551; [2006] 1 MLRH 150; [2006] 2 CLJ 1218 at p 1236 (HC) . According to the Court of Appeal in *Ong Thean Chye*, Justice Low Hop Bing was said to have 'neatly summarised the principles of law in *Matad Sdn Bhd v Ng Chee Keong* laid down by Gopal Sri Ram JCA (later FCJ) in these salient words':

(a) *the Act did not define 'estate agent' but instead defines 'estate agency practice' and focused the discovery of Parliamentary intention by referring to s 22C which provides for restrictions on estate agency practice*;

(b) the word 'acting' in s 2 must be read contextually ie, in the context of s 22C which contemplates someone who *'practises' or who may 'carry on business' as 'an estate agent'*, as in s 22C(1)(a) and (aa);

(c) *special notice should also be taken of the use of the word 'practise' in the opening words of s 22C(1),* which requires some system, a course of conduct, but not an isolated act;

(d) s 22C must be given *a contextual interpretation, based on the language employed by the section itself*;

(e) in Teh Swee Lian, Azhar Maah J had correctly held on the facts before him, that *an isolated act did not constitute holding out by the plaintiff* and that *evidence of system was necessary to prove estate agency practice* and ...

(Emphasis added.)

[68] Counsel for the plaintiffs said that the Act does not define 'estate agent' but defines 'estate agency *practice*'. Thus, special regard must be had to the word *practice*. Counsel also submitted that one cannot interpret s 22B and s 22C of the Act (then or now) which has the word *practice* everywhere ie in the subheadings, in the body of the provisions and in the subsections by ignoring or disregarding the word which *appears expressly* in the statute.

[69] It was submitted that in undertaking an interpretation of statutes, the duty of the court is to interpret the *words used by the legislature* and it has no power to fill in any gaps disclosed (see: *Magor and St Mellons Rural District Council Appellants; and Newport Corporation Respondents* [1952] AC 189 (HL)

at p 191) where it was enunciated that, *the court has no power to change any words used by the legislature*.

[70] Further, where the *words are simple and clear, it is the duty of the court of law to give these words their natural meaning even though such interpretation leads to apparent anomalies.*

[71] Counsel for the plaintiffs referred to the following cases, some of which were decided after the amendments to the Act to illustrate the approach taken by the courts in dealing with one-off or isolated real estate transactions. In the cases where the claims were held to be prohibited by the Act, the courts had determined that the claimant was engaged in estate agency practice or there was a system or an estate agency business, or estate agency relationship:

(a) *Carol a/p Chiristopher Pelly v Puspa a/p Muniandy (Berniaga Sebagai 'Reheboth Trading')* [2012] MLJU 576; [2012] MLRHU 658; [2012] 1 LNS 442 (HC);

(b) *Lee Chee Aik & Anor v Siow Moon Yeow* [2013] MLRHU 242; [2013] 1 LNS 258; [2013] 2 AMCR 227 (HC);

(c) *Poh Chat Jing v Chua Joo Cheng @ Chua Su Yin* [2014] MLRHU 955; [2014] 6 AMR 723; [2014] AMEJ 1215; [2015] 4 CLJ 1107; [2014] 1 LNS 1232 (HC);

(d) *Cekap Container Sdn Bhd v Lim Soon Peng & Ors* [2015] MLJU 100; [2015] 3 MLRH 651; [2015] 1 LNS 154; [2015] AMEJ 239 (HC);

(e) *Mok Shook Mooi (aka Sherene Mok) v Perbadanan Pengurusan Prisma Perdana & Ors* [2016] MLJU 1570; [2016] MLRHU 1588; [2017] AMEJ 0355; [2017] 1 LNS 333 (HC);

(f) *Liew Swee Yee & Anor v Metro Homes Sdn Bhd* [2017] MLJU 332; [2017] MLRHU 197; [2017] 1 LNS 356; [2017] AMEJ 0335 (HC);

(g) *Liew Swee Yee v Metro Homes Sdn Bhd* [2019] MLRHU 5; [2019] AMEJ 0005; [2019] 1 LNS 6 (HC);

(h) *Yong Ngik Ching v Tony Yu Yuong Wee & Anor* [2017] MLJU 696; [2017] MLRHU 446; [2017] 1 LNS 567; [2017] AMEJ 0573 (HC);

(i) *Ecofirst Hartz Sdn Bhd v Poon Mun Cheong & Anor* [2018] MLJU 901; [2019] 1 MLRH 343; [2018] MLRHU 1; [2018] 1 LNS 947 (HC); and

(j) *Goodwill Division Sdn Bhd v Low Peir Yin & Anor* [2019] 9 MLJ 286; [2019] MLRHU 15; [2019] 2 CLJ 795; [2019] AMEJ 0029 (HC).

[72] According to counsel for the plaintiffs, the common theme in the above

cases (whether or not *Matad* or *Teh Eng Peng* was referred to or relied upon, or whether or not the courts specifically alluded to the amendments in 2011 or 2017) is that in each of the case where the court found the Act was contravened, the court made a finding that there was evidence of estate agency practice or evidence of estate agency system, or evidence of a system of arrangement, or of continuity or of business activities or that the person had habitually carried out similar transactions on previous occasions.

[73] It was argued that the post amendment cases do show that the courts (although they may have not referred to *Matad* or *Teh Eng Peng*) have consistently applied the reasoning as propounded in *Matad*, *Teh Eng Peng* or *Ong Thean Chye*, that is to say, to base their determination on a case by case basis, *without ignoring* the word *practice* which is the entirety of the defined phrase 'estate agency practice'.

[74] Thus, to round off, counsel contended that *Matad* is good law and that the 2011 and 2017 amendments do not change the nature of the prohibition which had always been against conduct of a person engaged in 'estate agency practice' without being registered as an estate agent under the Act.

[75] Counsel said that post *Matad*, Parliament had at least two opportunities (when the amendments were made in 2011 and 2017) to 'close the gap' so to speak, and take away the exception of the one-off transaction or isolated transaction and prohibit in toto any activity whatsoever relating to estate agency by non-registered persons. However, the Act, in its plain reading based on the words used, does not do so. If that were the intention of Parliament, then it could have made that explicitly clear by way of an amendment and prohibit 'any act' as it has done so in other statutes eg the Legal Profession Act 1976 whereby s 36(1) states:

> (1) Subject to this section, no person shall practise as an advocate and solicitor or *do any act* as an advocate and solicitor unless his name is on the Roll and he has a valid practising certificate authorizing him to do the act ...

[76] Thus, counsel said that in exercising their judicial determination where allegations of contravention of the Act have been made, the courts have intentionally or unintentionally followed the very reasoning in the *Teh Eng Peng* case ie it must be established *an estate agency relationship existed between the parties*. Hence, in the absence of such a relationship the Act has no application.

[77] Significantly, *whether such a relationship exists in a given case, is a question of fact depending upon the facts and circumstances of each case*. It was contended that judicial determination has consistently been on a case by case basis on the facts and circumstances of each case and the courts have never taken the position of there being a blanket prohibition.

[78] In summary, it was argued for the plaintiffs that the principles *Matad* and *Teh Eng Peng* remain good law as the courts have consistently adhered to the following principles ie:

(a) the Act must be read contextually and the section uses language that requires some system. Words such as 'practise', 'carry on business' point to a course of conduct; not to an isolated act;

(b) nevertheless a single isolated act may amount to an estate agency practice if evidence of system is established;

(c) whether the plaintiffs can be considered to have carried out *estate agency practice* is to be assessed by looking at the surrounding circumstances related to the sale of the land and any similar transaction the plaintiffs may have been involved in; and

(d) the Act also requires an *estate agency relationship* to exist between parties. In the absence of such a relationship the Act has no application. Whether such a relationship exists in a given case is a question of fact depending upon the facts and circumstances of each case.

OUR DECISION

[79] We start with the pleading point. The plaintiffs' objection to the issue of illegality is that it was not pleaded and not raised during the trial. The issue was only raised during post-trial submissions. Reference was made to O 18 r 8 of the ROC which expressly states:

> Matters which shall be specifically pleaded (O 18 r 8)
>
> (1) A party shall in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, release, any relevant statute of limitation, fraud or any fact showing illegality —
>
> (a) which he alleges makes any claim or defence of the opposite party not maintainable;
>
> (b) which, if not specifically pleaded, might take the opposite party by surprise; or
>
> (c) which raises issues of fact not arising out of the preceding pleading. (Emphasis and underlining added.)

[80] It is trite law that the parties are bound by their pleadings. It is not in dispute that in the defence and counterclaim dated 28 February 2020 the defendant did not plead any facts showing the unlawfulness or illegality of the claim and in particular that there has been a breach of the Act. The defence was that there was no agreement between the defendant and the plaintiffs for the payment of RM20 psf and that the plaintiffs are liable to pay damages for misrepresentation. But the defendant maintains that based on the Federal

Court's decision in *Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay bin Abdullah* [2015] 5 MLJ 619; [2015] 5 AMR 681; [2015] 8 CLJ 212 (FC), illegality need not be pleaded and that a court must take note of illegality and refuse to enforce contracts which are ex facie (*on the face of it*) illegal.

[81] No doubt, it is settled law that illegality that is ex facie must be taken cognisance of by the court even if not pleaded, as most recently recognised by the Federal Court in *Merong Mahawangsa*. But, in this case, the defendant failed to plead the elements which are necessary to maintain that defence namely:

(a) that plaintiffs had held out and represented themselves as real estate agents; and

(b) particularised the estate agent relationship that allegedly existed between the parties; or

(c) that the plaintiffs were in the business of or practice of estate agency.

[82] We mentioned earlier that the judicial commissioner relied on the Court of Appeal's decision in *Mega Meisa* in regards to the failure to plead that the claim was prohibited by the Act. For completeness, we think it is necessary to mention that *Mega Meisa* went on appeal to the Federal Court and the appeals were allowed on 8 October 2020 (see: Federal Court Civil Appeal No 02(f)-68–08 of 2019 (W) and 02(f)-67–08 of 2019 (W)). However, it appears from the Federal Court's notes of proceedings that the failure to plead illegality was not one of the questions in respect of which leave was granted. Rather, the appeals were allowed on other grounds, which are not relevant to the issues at hand.

[83] Next, we intend to deal with *Matad* and *Teh Eng Peng*. But before embarking on a discussion of these cases, we will deal with the issue of interpretation of the 2011 and 2017 amendments. In this regard, we agree with the submissions that were made on behalf of the plaintiffs. From our reading of the 2011 amendments, it appears that 'estate agency practice' was expanded whereby any acting and holding out, does not have to be to the public at large only, but includes acting or holding out 'to any individual or firm'.

[84] The other aspect of the 2011 amendment was that being ready to act as an agent for a sale, disposal, acquisition lease or tenancy included 'making known the availability of the land building or other interest' for sale or other disposal, purchase or other acquisition, leasing or letting. And as for the 2017 amendment, the main difference is that, prior to 2017, 'estate agency practice' was defined in the definition section whereas after the 2017 amendments, the terminology 'estate agency practice' was deleted from the definition section (s 2 of the Act) and was placed within the body of the Act under Part VA. Therefore

the 2017 amendments did not affect the substance of the definition of estate agency practice and was merely a re-formatting of the Act. In the final analysis, it will be seen that post the 2017 amendments, the proscribed activity under the Act is 'estate agency practice'. As such, the amendments did not abrogate the principles established by *Matad* and *Teh Eng Peng* and these cases remain relevant and applicable.

[85] We turn now to the Court of Appeal's ruling in *Matad*. The facts of the case in *Matad* were as follows. The defendant, which was interested in buying some land, promised to pay the plaintiff 1% commission for introducing land. The plaintiff introduced the defendant to a vendor with land for sale at a substantial price. The defendant bought the land but refused to pay the plaintiff his commission.

[86] Thus, the plaintiff brought an action to recover the sum promised. The defendant took two main defences, which were: (a) that it was not the plaintiff who introduced the land (the factual defence); and (b) that the contract which the plaintiff sought to be enforced was illegal and void in that it contravened the Valuers, Appraisers and Estate Agents Act 1981 (the legal defence).

[87] The High Court found in *Matad* for the plaintiff on both issues. The defendant appealed to the Court of Appeal against this decision, contending that the judge had misdirected himself on the point of illegality. According to the Court of Appeal the word 'acting' in s 2 of the Act must be read in the context of s 22C of the Act, which was the section that contemplates someone who 'practises as' or who may 'carry on business' as 'an estate agent'. The Court of Appeal went on to hold that words such as 'practise' and 'carry on business' point, not to an isolated act, but to a course of conduct.

[88] On the issue of illegality vis a vis recovery of estate agent commissions, the Court of Appeal in *Matad* endorsed the decision by Justice Azhar Maah in *Teh Swee Lian Lwn Teh Eng Peng @ Teh Joo dan satu lagi* [1998] MLJU 265; [1998] 3 CLJ Supp 504 (HC), where it was enunciated that an isolated act did not constitute a holding out by the plaintiff and that evidence of system was necessary to prove estate agency practice.

[89] The Court of Appeal in *Matad* also opined that the High Court's decision in the case of *Lim Eng Heng v Lim Sam Keow & Others* [2003] MLJU 47; [2003] 6 CLJ 1; [2003] 2 AMR 520 (HC), which held that an isolated transaction fell within the terms of the Act so that the plaintiff's claim in that case was tainted with illegality, as having been *wrongly decided*. The Court of Appeal in *Matad* endorsed the view that an isolated act may amount to estate agency practice if evidence of a system of such acts is established to the satisfaction of the court.

[90] We turn now to the Court of Appeal's decision in *Teh Eng Peng*. In *Teh Eng Peng*, the first appellant and his two brothers, the second appellant and one Teh Eng Choo, were co-owners of four pieces of land ('the said lands'). They decided to dispose of the said lands and drew up an agreement authorising the respondent — the son of Teh Eng Choo and, therefore, the nephew of the first and second appellants — to find a buyer for the said lands. The respondent succeeded in obtaining a purchaser for the first three pieces of the said lands, and subsequently, brought a claim for his commission and an additional sum due to him under the agreement.

[91] The first appellant, relying on ss 22B and 22C of the Valuers, Appraisers and Estate Agents Act 1981, contended that since the respondent was not a registered real estate agent and thus not authorised under the Act to undertake estate agency practice, the actions and steps taken by the respondent in the sale of the said lands was contrary to the law.

[92] The respondent, however, argued that he was not practising or carrying on an estate agency practice and that what he did in the circumstances of this case fell outside the provisions of the Act. The High Court allowed the respondent's claim. The Court of Appeal applied the principle that was established by the Court of Appeal in *Matad* and dismissed the appeal. The Court of Appeal held that the transaction in question was 'just an isolated transaction'. Further, the Court of Appeal observed that there was no 'estate agency relationship' existing between the respondent and the landowners, including the first appellant. Focusing on the evidence, the Court of Appeal noted that what had happened was that the landowners requested the respondent to look for potential buyers of the said lands, and if he succeeded, he would be paid a commission.

[93] According to the Court of Appeal, there was nothing to show that the respondent had offered any professional advice or other services to the first appellant as an estate agent. In addition, the respondent was a close relation of the first appellant and his father was one of the co-owners of the said lands.

[94] In the opinion of the Court of Appeal all these facts conjointly negatived the existence of an 'estate agency relationship' between the parties. According to the Court of Appeal, the respondent could not be said to be carrying on the practice of estate agency based on a single transaction, in the absence of some evidence of a system or continuity in his conduct or activity.

[95] Hence, based on *Matad* and *Teh Eng Peng*, these must be cogent and compelling evidence to establish that there was some system or continuity about the plaintiffs' conduct before any inference of estate agency practice can be made. As we mentioned earlier, nothing was pleaded, nothing was 'put', and

nothing was proven to substantiate the defendant's (belated) suggestion that the plaintiffs were engaged in estate agency practice.

[96] This is underscored by the imperative words of O 18 r 8 of the ROC which requires that the facts giving rise to illegality have to be pleaded. the defendant cannot just conveniently contend that this is a case of ex facie illegality. They have to plead, then put their case and finally, prove it to the satisfaction of the trial court.

[97] No doubt, the court can take cognisance of illegality, even if it is not pleaded, but for that to happen, the contract on which the claim is predicated, must be ex facie illegal. In *Abdol Mulok bin Awang Damit v Perdana Industri Holdings Bhd* [2003] 4 MLJ 441; [2003] 4 AMR 285; [2003] 3 CLJ 497 (CA) the Court of Appeal opined (p 444 (MLJ)) that the failure to plead illegality is not in itself fatal, provided the claim or transaction is ex facie illegal:

> We were well aware of the settled principle that a party may raise a point on illegality even at an appeal stage (see *Thangaulu v Saudagar Singh* [1965] 1 MLJ 38). However, in the instant case, *it was not shown in any fashion that the transaction in question was ex facie illegal as to warrant the court not to enforce it.*

[98] Now, applying those principles to the factual matrix here, if illegality had been pleaded in the defence, then the plaintiffs would have been put on notice of a possible legal impediment to their claim and they would have marshalled such evidence or responses as may be necessary to rebut the presumption or inference of illegality.

[99] In the present context, if illegality had been pleaded, then the plaintiffs would have had to rebut or repudiate the defendant's allegation that they were engaged in 'estate agency practice'. Thus, since the issue was not pleaded in the defence and not raised during the trial, but only raised during post-trial written submissions, the plaintiffs were deprived of the opportunity of neutralising the allegation that they were engaged in estate agency practice. Indeed, the allegation of illegality seems to be an 'afterthought' and in any event, amounts to 'trial by ambush' which is a key building block for miscarriage of justice.

[100] In *North Western Salt Company, Limited v Electrolytic Alkali Company, Limited* [1914] AC 461 (HL), the principle and the necessary strictures in regards to the court's ability to dismiss a claim based on illegality was lucidly explained by the House of Lords, per Lord Haldane LC who said (p 469):

> My Lords, it is no doubt true that *where on the plaintiff's case it appears to the court that the claim is illegal, and that it would be contrary to public policy to entertain it, the court may and ought to refuse to do so. But this must only be when either the agreement sued on is on the face of it illegal*, or *where, if facts relating to such an agreement are relied on, the plaintiff's case has been completely presented.*

If the point has not been raised on the pleadings so as to warn the plaintiff to produce evidence which he may be able to bring forward rebutting any presumption of illegality which might be based on some isolated fact, then the court ought not to take a course which may easily lead to a miscarriage of justice. On the other hand, *if the action really rests on a contract which on the face of it ought not to be enforced, then, as I have already said, the court ought to dismiss the claim, irrespective of whether the pleadings of the defendant raise the question of illegality*.

[101] Thus, in our view, the legal position in regards to a one-off or isolated real estate transaction is that it will trigger the prohibition under the Act if there is a system or course of conduct which shows that the plaintiffs were practicing or carrying on business as estate agents. This has to be pleaded, put to the plaintiffs and proven to the satisfaction of the trial court.

[102] Next, we turn to the defendant's suggestion that P1's WhatsApp messages are indicative of P1 engaging in estate agency practice. The words which the defendant seemed to focus on are, 'I have a serious buyer'. The messages read as follows:

Fri, 22 Feb 2019

Moon hope you are fine please ket [sic] Dato know i have a serious buyer for the land in sentul at least i can make back my money and Dato can also get back his money since he is not happy with the land I need the authorisation letter from Dato to proceed please tq

Sat, 23 Feb 2019

Gd morning Moon please call me tq

Sun, 24 Feb 2019

Dato gd evening in the last meeting you agreed to give me the authorisation letter to sell the land since you were not happy with the purchase of the land and our money is also stuck with you anyway i have got a serious buyer for the land please issue me the letter so that i can proceed and also for you to get back the money you paid for the land Please Dato tq

Mon, 25 Feb 2019

Dato gd evening in the last meeting you agreed to give me the authorisation letter to sell the land since you were not happy with the purchase of the land and our money is also stuck with you anyway i have got a serious buyer for the land please issue me the letter so that i can proceed and also for you to get back the money you paid for the land Please Dato tq

Forwarded

MR THOMAS take note please one more you try abuse me I will claim back 75k from you. Be gentle man please

Mon, 25 Feb 2019

...

A Dato only you know who abuse whom we respected you as a close friend and worked hard on the deal you are not happy with the deal fine we will sell the land for the price you paid and return it back to you amicably thats all tq

B **[103]** As interesting as these WhatsApp messages may be, we think that it is way too late in the day for the defendant to make reference to these messages in an attempt at suggesting that the plaintiffs or P1 were/was engaged in estate agency practice.

C **[104]** Indeed, from P1's answers in cross-examination and re-examination, he made it quite clear that he is not an estate agent and he was not involved in estate agency practice and that his claim had nothing to do with estate agency. Pertinently, P1's stand on these matters were not repudiated during cross-examination. The claim, as P1 put it, was based on a 'mutual agreement'. D Indeed, counsel for the defendant even suggested that there was no agreement and that RM75,000 (paid in three tranches) was paid on 'goodwill basis'.

[105] As such, having regard to the pleadings and the trial strategy of the defendant, there is just no scope for the real estate agency issue to creep into the E matrix of facts or issues which were canvassed at the trial. In raising the issue of real estate agency practice (via post-trial written submission), the defendant had clearly made a radical departure from its pleaded case per the defence. In the circumstances, it would be manifestly unjust to permit the issue of illegality to be considered.

F

[106] In any event, the judicial commissioner had made a finding of fact that there was no evidence of any estate agency practice. In our view, the defendant has not demonstrated that the judicial commissioner's finding in this regard G can be said to be plainly wrong.

RESULT

[107] Having carefully considered the matter and having due regard to the H comprehensive written submissions and the extensive oral clarification before us, we find that there is no appealable error to warrant any appellate interference in this case. In our view the learned judicial commissioner having considered all the evidence, was fully entitled to reach his evaluative judgement as per the grounds of judgment. Although the defendant criticised the judicial I commissioner's approach and reasoning, we are not persuaded that the judicial commissioner's approach on the issue of illegality was erroneous, the reasoning flawed or the conclusions wrong.

[108] In the circumstances, we are not satisfied that the decision of the learned judicial commissioner was plainly wrong in allowing the plaintiffs' claim and dismissing the defendant's counterclaim.

[109] To summarise, in our view:

(a) the issue of illegality was not available to the defendant as the issue was not pleaded (see: O 18 r 8 of the ROC);

(b) illegality was not framed as an issue to be tried;

(c) the issue of illegality was not raised during the trial in the sense that it was not 'put' to the plaintiffs that their claim was tainted with illegality;

(d) there was neither a plea, nor any evidence of a system which could be construed as the plaintiffs being engaged in or carrying on an estate agency practice or that there existed an estate agency relationship;

(e) the plaintiffs were not afforded the opportunity to adduce relevant evidence to repudiate the defendant's belated suggestion that their claim is contrary to the provisions of the Act;

(f) in any event, the judicial commissioner had made a clear and unequivocal finding of fact that there was no evidence of a system that was practiced by the plaintiffs which was suggestive of an estate agency practice;

(g) the defendant as the party which (belatedly) asserted that the plaintiffs' claim is tainted by illegality has the burden of proving that there was an estate agency relationship. If there is no such relationship then the Act does not bite. And, whether such a relationship exists in a given case is a question of fact depending upon the facts and circumstances of each case; and

(h) despite the amendments to the Act, the Court of Appeal's decisions in *Matad* and *Teh Eng Peng* remain good law. As such, a one-off or isolated real estate agency transaction will be caught by the prohibitions under the Act only if it is proven on a balance of probabilities that the plaintiffs were engaged in an estate agency practice or that there was a system of estate agency or there was an estate agency relationship.

[110] For the reasons as stated and elaborated above, the defendant's appeal is dismissed with costs of RM25,000 (subject to allocatur).

Appellant's appeal dismissed with costs of RM25,000 subject to allocatur.

Reported by Dzulqarnain Ab Fatar